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SUPREME COURT, U.S.

## TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 439

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LOUIS LEVINSON AND MITCHELL A. HALL,  
PETITIONERS,

vs.

WILLIAM DEUPREE, JR., ADMINISTRATOR  
OF THE ESTATE OF KATHERINE  
WING, DECEASED

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

---

PETITION FOR CERTIORARI FILED NOVEMBER 17, 1952

IN THE  
**United States Court of Appeals**  
FOR THE SIXTH CIRCUIT

No. \_\_\_\_\_

LOUIS LEVINSON AND MITCHELL A. HALL,  
*Appellants,*

v.

WILLIAM DEUPREE, JR., ANCILLARY ADMINIS-  
TRATOR OF THE ESTATE OF KATHERINE  
WING, DECEASED,

*Appellee.*

**TRANSCRIPT OF RECORD**

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# UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

In Admiralty No. 364

WILLIAM DEUPREE, JR., 106 East Third Street, Covington, Kentucky, Ancillary Administrator of the Estate of Katherine Wing, deceased,

*Libelant,*

v.

LOUIS LEVINSON, 119 Riverside Parkway, Fort Thomas, Kentucky,

and

MITCHELL A. HALL, 75 Rossford Avenue, Fort Thomas, Kentucky,

*Respondents.*

## LIBEL

(Filed: 12/7/1948)

The libel and complaint of William Deupree, Jr., as ancillary administrator of the Estate of Katherine Wing, deceased, in a cause of wrongful death, civil and maritime, alleges and respectfully shows to this Honorable Court as follows:

1. Katherine Wing, also known as Kitty Wing, died intestate a resident of New York County, State of New York on the 19th day of June, 1948. On or about the 22nd day of October, 1948, Rose Wing qualified as administratrix of the estate of said decedent in the Surrogate's Court of New York County, New York, by taking the oath and executing bond as required by law, and said Rose Wing ever since that date has been and now is

*Libel*

the regular qualified and duly acting administratrix of the estate of Katherine Wing, deceased. On or about the 7th day of December, 1948, libelant and petitioner, William Deupree, Jr. qualified as ancillary administrator of the estate of said Katherine Wing, deceased, in the County Court of Kenton County, Kentucky, by taking the oath and executing bond as required by law, and libelant and petitioner ever since that date has been and now is the regular qualified and acting ancillary administrator of the estate of Katherine Wing, deceased.

2. On June 19, 1948, intestate Katherine Wing was a passenger in a motorboat owned by respondent, Louis Levinson, which was being operated and piloted downstream by said Levinson in a northwesterly direction on the Ohio River in Campbell County, Kentucky, and within the jurisdiction of the State of Kentucky, near the Cincinnati Yacht Club which is located on the northeast shore of said river in Hamilton County, Ohio. At the same time and place respondent Mitchell A. Hall was the owner of a motorboat which he was operating and piloting upstream in a southeasterly direction.

3. Said respondents, and each of them, at said time and place, operated and piloted their motorboats, negligently, wilfully and maliciously at a high and excessive rate of speed without regard to the safety of themselves or each other or of others, without yielding the right of way, without giving proper signals and without stopping their engines and backing their boats as they should, lawfully and in the exercise of ordinary discretion and reasonable care, have done. By reason of said negligent, wilful and malicious conduct upon the part of the respondents, and each of them, said respondents caused their respective motorboats to collide with one another, and as a direct and proximate result thereof libelant's and

*Libel*

petitioner's intestate, without any negligence on her part, was thrown violently from her seat in respondent Levinson's boat against the side of said boat and into the water, receiving injuries which caused her death.

4. By reason of the negligent, wilful and malicious conduct upon the part of the respondents' and each of them, as aforesaid, in causing and bringing about libelant's and petitioner's intestate's death, her estate has been damaged in the sum of one hundred and fifty thousand (\$150,000.00) dollars.

WHEREFORE, William Deupree, Jr., ancillary administrator of the estate of Katherine Wing, deceased, prays for judgment against the respondents, and each of them, in the sum of one hundred and fifty thousand (\$150,000.00) dollars, for his costs herein expended, and for such other and proper relief to which he may be entitled.

NICHOLS, WOOD, MARX & GINTER  
900 Traction Building  
Cincinnati, Ohio

GARY & GARY  
New York, N. Y.

DEUPREE & DEUPREE  
106 East Third Street  
Covington, Kentucky  
Proctors for Libelant and Petitioner

STATE OF KENTUCKY }  
COUNTY OF KENTON } ss

William Deupree, Jr., being first duly sworn; says that he is the libelant and petitioner in this action and that the facts set forth in the foregoing libel and petition are true to his information and belief.

/s/ WILLIAM DEUPREE, JR.

*Answer of Respondent, Levinson*

Sworn to before me and subscribed in my presence this  
day of December, 1948.

Notary Public, Kenton County,  
Kentucky

**SEPARATE ANSWER OF RESPONDENT,  
LOUIS LEVINSON**

(Filed 3/3/49)

*To the Honorable Judges of the United States District Court for the Eastern District of Kentucky sitting in Admiralty at Covington, is hereby tendered for filing the separate answer of the respondent, Louis Levinson, to the libel and complaint of William Deupree, Jr., ancillary administrator of the estate of Katherine Wing, deceased.*

(1) Respondent, Louis Levinson, for answer herein to the libel and complaint of William J. Deupree, Jr., as the ancillary administrator of the estate of Katherine Wing, deceased, says that he is without knowledge or information sufficient to form a belief as to the truth of the averments in article (1) of said libel and complaint and therefore denies the allegations thereof.

(2) Admits that on June 19, 1948, one Katherine Wing was a passenger in a motor boat owned by this respondent and except for such admission of the allegations contained in article (2) of said libel and complaint denies the several allegations thereof.

(3) Denies the allegations of article (3) of said libel and complaint.

(4) Denies the allegations of article (4) of said libel and complaint.

*Answer of Respondent, Levinson*

WHEREFORE, the respondent prays that the libel be dismissed with costs.

/s/ CHAS. E. LESTER, JR.  
for Lester & Riedinger  
Lester & Riedinger  
Proctors for Respondent,  
Louis Levinson  
8 East Fifth Street  
Newport, Kentucky

Chas. E. Lester, Jr., says that he is a member of the law firm of Lester and Riedinger, proctors for respondent, Louis Levinson, and that said respondent is now absent from the Eastern District of Kentucky and from the Commonwealth of Kentucky and that the allegations contained in the foregoing separate answer of said respondent are true, as this affiant verily believes.

/s/ CHAS. E. LESTER, JR.  
Chas. E. Lester, Jr.

Subscribed and sworn to before me by Chas. E. Lester, Jr., this the 17th day of March, 1949.

MELVA HEDGES,

Notary Public,  
Campbell County, Kentucky.

My Commission expires:  
September 3, 1952.

To Nichols, Wood, Marx and Ginter and  
To Deupree and Deupree,  
Proctors for Libelant:

Please take notice that an answer of which the within is a copy was this day duly filed in the above entitled cause in the office of the clerk of the within named court.

*Answer of Respondent, Levinson*

Dated at Covington, Kentucky, this the 17th day of March, 1949.

/s/ CHAS. E. LESTER, JR.  
for Lester & Riedinger  
Lester and Riedinger  
Proctors for Respondent,  
Louis Levinson  
8 East Fifth Street  
Newport, Kentucky

**SEPARATE ANSWER OF RESPONDENT,  
MITCHELL HALL**

(Filed: 3/3/1949)

*To the Honorable Judges of the United States District Court for the Eastern District of Kentucky sitting in Admiralty at Covington is hereby tendered for filing the separate answer of the respondent, Mitchell Hall, to the libel and complaint of William Deupree, Jr., ancillary administrator of the estate of Katherine Wing, deceased.*

(1) Respondent, Mitchell Hall, for answer herein to the libel and complaint of William J. Deupree, Jr., as the ancillary administrator of the estate of Katherine Wing, deceased, says that he is without knowledge or information sufficient to form a belief as to the truth of the averments in article (1) of said libel and complaint and therefore denies the allegations thereof.

(2) Admits that on June 19, 1948, one Katherine Wing was a passenger in a motor boat owned by respondent Louis Levinson; admits that this respondent was the owner of a motor boat which he was operating and piloting at the time and place mentioned in the libel and complaint and except for such admission of the allega-

*Answer of Respondent, Hall*

tions contained in article (2) of said libel and complaint denies the several allegations thereof.

(3) Denies the allegations of article (3) of said libel and complaint.

(4) Denies the allegations of article (4) of said libel and complaint.

WHEREFORE, the respondent prays that the libel be dismissed with costs.

Blakely, Moore and Harrison,  
Proctors for Respondent,  
Mitchell Hall  
106 East Third Street  
Covington, Kentucky.

Mitchell Hall says that he is one of the respondents herein and that the allegations contained in the foregoing separate answer are true.

Mitchell Hall

Subscribed and sworn to before me by Mitchell Hall  
this 22nd day of March, 1949.

Notary Public,  
Kenton County, Kentucky.

My Commission expires:

To Nichols, Wood, Marx & Ginter and  
To Deupree and Deupree,  
Proctors for Libelant:

Please take notice that an answer of which the within is a copy was this day duly filed in the above entitled cause in the office of the clerk of the within named court.

8

*Affidavit of Libelant*

Dated at Covington, Kentucky, this the 22nd day of March, 1949.

/s/ BLAKELY, MOORE AND HARRISON,  
Blakely, Moore and Harrison,  
Proctors for Respondent,  
Mitchell Hall  
106 East Third Street  
Covington, Kentucky

**AFFIDAVIT OF LIBELANT FOR LEAVE  
TO SUE IN FORMA PAUPERIS**

(Filed: 7/7/1949)

UNITED STATES OF AMERICA, EASTERN DISTRICT OF KENTUCKY, KENTON COUNTY, SS:

William Deupree, Jr., being first duly sworn, deposes and says that he is a citizen of the United States and the duly appointed and acting ancillary administrator of the estate of Katherine Wing, deceased, and as such is the libelant in the above captioned suit which was filed on December 7, 1948, and in which both respondents have entered their appearances by filing answers; that said respondents have moved the court for an order requiring libelant to give a stipulation with sufficient surety to pay all costs and expenses which may be awarded against libelant; that libelant is entitled to commence and maintain said suit and believes that he is entitled to the redress sought to be obtained therein; that the nature of the cause of action is for wrongful death of the plaintiff's decedent, Katherine Wing, which occurred as a result of a collision of a motor boat owned and operated by respondent Levinson, in which boat libelant's decedent was a passenger, and a motor boat owned and

*Special Demurrer*

operated by respondent Hall on the Ohio River in Campbell County, Kentucky, near Cincinnati, Ohio, on June 11, 1948, within the admiralty jurisdiction of this court; that libelant's decedent was possessed of no estate out of which costs or expenses herein can be paid or from which security therefor can be given; that libelant is informed and believes that no person entitled by law to share in the estate of decedent Katherine Wing is able to pay the costs of said suit or to give security for the same; that this affidavit is made for the purpose of availing libelant of the rights and privileges in such cases provided in Section 1915, Title 28, of the United States Code.

WHEREFORE, deponent prays that he may have leave to prosecute said suit in *forma pauperis* pursuant to said statute and that respondents' motions for security for costs be denied.

/s/ WILLIAM DEUPREE, JR.

Sworn to before me and subscribed in my presence this 7th day of July, 1949.

Notary Public, Kenton County, Ky.

**SPECIAL DEMURRER**

(Filed 7/7/1949)

The respondent, Louis Levinson, demurs specially to the libel of William Levinson, Jr., Ancillary Administrator of the Estate of Katherine Wing, deceased, upon the ground that it is apparent upon the face of the record herein (1) that this Court has no jurisdiction to try the within cause and (2) that this Court has no jurisdiction

*Special Demurrer*

over the subject matter and (3) that the libelant has not legal capacity to sue.

/s/ **LESTER & RIEDINGER**

**Proctors for Respondent,  
Louis Levinson**

Served a copy of the within pleading by delivering a copy hereof to William J. Deupree, one of the proctors for libelant.

**AUTHORITY**

*Walter's Adm'r. v. Kentucky Traction and Terminal Company*, 206 Ky. 100, 266 S.W. 887, decided September 9, 1924

*Hall's Adm'r. v. L. & N.*, 102 Ky. 480, 43 S.W. 698, 19 Ky. L. Rep. 1529, 80 Am. St. Rep. 358, decided September Term 1897

*Turner's Adm'r. v. L. & N. R.R.*, 110 Ky. 879, 62 S.W. 1025, 23 Ky. L. Rep. 340, decided April Term 1901

*Jones' Adm'r. v. Lay*, 66 S.W. 720, 23 Ky. L. Rep. 2113, decided February 18, 1902

*I.C.R.R. Co. v. Stith, Adm'r.*, 120 Ky. 237, 85 S.W. 1173, 1 L.R.A. (NS) 1014, decided March 25, 1905

*Jewel Tea Co., et al v. Walker's Adm'r.*, 161 S.W. (2d) 66, 290 Ky. 328, decided February 24, 1942

*Vassill's Adm'r. et al v. Scarsella*, 166 S.W. (2d) 64, 292 Ky. 153, decided May 15, 1942

Examination of the Kentucky Digest, Southwestern Reporter, Kentucky Reports and Shepard's Citator reveals that there are no decisions on the point involved later than the two cases last cited.

*Special Demurrer***SPECIAL DEMURRER**

(Filed: 7/7/49)

The respondent, Mitchell Hall, demurs, specially to the libel of William Deupree, Jr., Ancillary Administrator of the Estate of Katherine Wing, deceased, upon the ground that it is apparent upon the face of the record herein (1) that this Court has no jurisdiction to try the within cause and (2) that this Court has no jurisdiction over the subject matter and (3) that the libelant has not legal capacity to sue.

/s/ BLAKELY, MOORE & HARRISON

Proctors for Respondent,

Mitchell Hall

Served a copy of the within pleading by delivering a copy hereof to William J. Deupree, one of the proctors for libelant.

**AUTHORITY**

*Walter's Adm'r. v. Kentucky Traction and Terminal Company*, 206 Ky. 100, 266 S.W. 887, decided September 9, 1924

*Hall's Adm'r. v. L. & N.*, 102 Ky. 480, 43 S.W. 698, 19 Ky. L. Rep. 1529, 80 Am. St. Rep. 358, decided September Term 1897

*Turner's Adm'r. v. L. & N. R.R.*, 110 Ky. 379, 62 S.W. 1025, 23 Ky. L. Rep. 340, decided April Term 1901.

*Jones' Adm'r. v. Lay*, 66 S.W. 720, 23 Ky. L. Rep. 2113, decided February 18, 1902

*Motion for Leave to Amend Libel*

*I.C.R.R. Co. v. Stith, Adm'r.,*

120 Ky. 237, 85 S.W. 1173, 1 L.R.A.

(NS) 1014, decided March 25, 1905

*Jewel Tea Co., et al v. Walker's Adm'r.,*

161 S.W. (2d) 66, 290 Ky. 328, decided

February 24, 1942

*Vassill's Adm'r. et al v. Scarsella,*

166 S.W. (2d) 64, 292 Ky. 153, decided

May 15, 1942

Examination of the Kentucky Digest, Southwestern Reporter, Kentucky Reports and Shepard's Citator reveals that there are no decisions on the point involved later than the two cases last cited.

**MOTION FOR LEAVE TO AMEND LIBEL**

(Filed: 7/29/1949)

Now comes the libelant and, pursuant to Admiralty Rule 23, moves the Court for leave to file herein his amended libel, which is attached hereto, making the libelant a party in his capacity as ancillary administrator of the Estate of Katherine Wing, deceased, appointed by the County Court of Campbell County, Kentucky.

Proctors for Libelant

**AMENDED LIBEL**

(Filed: 7/29/1949)

The amended libel and complaint of William Deupree, Jr., as ancillary administrator of the Estate of Katherine Wing, deceased, in a cause of wrongful death, civil and maritime, alleges and respectfully shows to this Honorable Court as follows:

1. Katherine Wing, also known as Kitty Wing, died intestate a resident of New York County, State of New York on the 19th day of June, 1948. On or about the 22nd day of October, 1948, Rose Wing qualified as admin-

*Amended Libel*

istratrix of the estate of said decedent in the Surrogate's Court of New York County, New York, by taking the oath and executing bond as required by law, and said Rose Wing ever since that date has been and now is the regular qualified and duly acting administratrix of the estate of Katherine Wing, deceased. On or about the 7th day of December, 1948, libelant and petitioner, William Deupree, Jr., qualified as ancillary administrator of the estate of said Katherine Wing, deceased, in the County Court of Kenton County, Kentucky, by taking the oath and executing bond as required by law, and on or about the 28th day of July, 1949, he qualified as ancillary administrator of the estate of said Katherine Wing, deceased in the County Court of Campbell County, Kentucky, by taking the oath and executing bond as required by law, and libelant and petitioner ever since those dates has been and now is the regular qualified and acting ancillary administrator of the estate of Katherine Wing, deceased.

2. On June 19, 1948, intestate Katherine Wing was a passenger in a motorboat owned by respondent, Louis Levinson, which was being operated and piloted downstream by said Levinson in a northwesterly direction on the Ohio River in Campbell County, Kentucky, and within the jurisdiction of the State of Kentucky, near the Cincinnati Yacht Club which is located on the northeast shore of said river in Hamilton County, Ohio. At the same time and place respondent Mitchell A. Hall was the owner of a motorboat which he was operating and piloting upstream in a southeasterly direction.

3. Said respondents, and each of them, at said time and place, operated and piloted their motorboats negligently wilfully and maliciously at a high and excessive rate of speed without regard to the safety of themselves

*Amended Libel*

or each other or of others, without yielding the right of way, without giving proper signals and without stopping their engines and backing their boats as they should, lawfully and in the exercise of ordinary discretion and reasonable care, have done. By reason of said negligent, wilful and malicious conduct upon the part of the respondents, and each of them, said respondents caused their respective motorboats to collide with one another, and as a direct and proximate result thereof libelant's and petitioner's intestate, without any negligence on her part, was thrown violently from her seat in respondent Levinson's boat against the side of said boat and into the water, receiving injuries which caused her death.

4. By reason of the negligent, wilful and malicious conduct upon the part of the respondents, and each of them, as aforesaid, in causing and bringing about libelant's and petitioner's intestate's death, her estate has been damaged in the sum of one hundred and fifty thousand (\$150,000.00) dollars.

WHEREFORE, William Deupree, Jr., ancillary administrator of the estate of Katherine Wing, deceased, prays for judgment against the respondents, and each of them, in the sum of one hundred and fifty thousand (\$150,000.00) dollars, for his costs herein expended, and for such other and proper relief to which he may be entitled.

NICHOLS, WOOD, MARX & GINTER  
900 Traction Building  
Cincinnati, Ohio

GARY & GARY  
New York, N. Y.

DEUPREE & DEUPREE  
106 East Third Street  
Covington, Kentucky

Proctors for Libelant and Petitioner

*Order*

STATE OF KENTUCKY }  
 COUNTY OF KENTON } SS

William Deupree, Jr., being first duly sworn, says that he is the libelant and petitioner in this action and that the facts set forth in the foregoing amended libel and complaint are true to his information and belief.

/s/ WILLIAM DEUPREE, JR.

Sworn to before me and subscribed in my presence  
 this 6 day of July, 1949.

Notary Public, Kenton County, Ky.

**ORDER**

(Filed: 8/2/1949)

This 29th day of July 1949, came the libelant, by counsel, Nichols, Wood, Marx and Ginter, and offers for filing motion for leave to amend libel and amended libel, and the Court being advised, it is ordered that the same be now filed and noted of record.

MAC SWINFORD, *Judge*

**ORDER**

(Filed: 9/2/1949)

This case is set down for a pre-trial conference at Covington, Kentucky, in the regular Federal Courtroom at eleven (11:00) o'clock A. M., Eastern Standard Time, on Friday, September 9, 1949.

MAC SWINFORD, *Judge*

**ORDER**

(Filed: 9/29/1949)

This cause came on pursuant to order entered herein on September 2, 1949, for a pre-trial conference.

The parties were represented by counsel of record.

*General Demurrer*

Arguments were heard and the court made the following ruling:

The affidavit of the libelant setting forth the fact that the decedent had no property in this state at the time of her death should be considered by the Court in ruling on the special demurrer. To this ruling the libelant objects and excepts.

The special demurrer is sustained to which the libelant objects and excepts.

The amended libel heretofore marked tendered is ordered filed. To which the respondents except.

Came the respondents and demur generally to the amended libel.

The Libelant is given until September 15, 1949 to file a brief in opposition to the general demurrer.

The respondents are given until September 20, to file a brief in support of the general demurrer.

The clerk will forward the record to the court on September 20th, 1949.

MAC SWINFORD, *Judge*

**GENERAL DEMURRER**

(Filed: 9/9/1949)

The respondent, Louis Levinson, demurs generally to the amended libel of William Deupree, Jr., Ancillary Administrator of the Estate of Katherine Wing, deceased, upon the ground that said pleading does not state facts sufficient to constitute or support a cause of action.

Proctors for Respondent,  
Louis Levinson

Served a copy of the within pleading by delivering a copy hereof to William J. Deupree, one of the proctors for libelant.

*General Demurrer*

## AUTHORITY

*Walter's Adm'r. v. Kentucky Traction and Terminal Company*, 206 Ky. 100, 266 S.W. 887, decided September 9, 1924

*Hall's Adm'r. v. L. & N.*, 102 Ky. 480, 43 S.W. 698, 19 Ky. L. Rep. 1529, 80 Am. St. Rep. 358, decided September Term 1897

*Turner's Adm'r. v. L. & N. R.R.*, 110 Ky. 879, 62 S.W. 1025, 23 Ky. L. Rep. 340, decided April Term 1901

*Jones' Admr. v. Lay*, 66 S.W. 720, 23 Ky. L. Rep. 2113, decided February 18, 1902

*I.C.R.R. Co. v. Stith, Adm'r.*, 120 Ky. 237, 85 S.W. 1173, 1 L.R.A. (NS) 1014, decided March 25, 1905

*Jewel Tea Co., et al v. Walker's Adm'r.*, 161 S.W. (2d) 66, 290 Ky. 328, decided February 24, 1942

*Vassill's Adm'r. et al v. Scarsella*, 166 S.W. (2d) 64, 292 Ky. 153, decided May 15, 1942

Examination of the Kentucky Digest, Southwestern Reporter, Kentucky Reports and Shepard's Citator reveals that there are no decisions on the point involved later than the two cases last cited.

## GENERAL DEMURRER

(Filed: 9/9/1949)

The respondent, Mitchell Hall, demurs generally to the amended libel of William Deupree, Jr., Ancillary Administrator of the Estate of Katherine Wing, deceased, upon

*General Demurrer*

the ground that said pleading does not state facts sufficient to constitute or support a cause of action.

/s/ BLAKELY, MOORE & HARRISON  
Proctors for Respondent,  
Mitchell Hall

Served a copy of the within pleading by delivering a copy hereof to William J. Deupree, one of the proctors for libelant.

## AUTHORITY

*Walter's Adm'r. v. Kentucky Traction and Terminal Company*, 206 Ky. 100, 266 S.W. 887, decided September 9, 1924

*Hall's Adm'r. v. L. & N.*, 102 Ky. 480, 43 S.W. 698, 19 Ky. L. Rep. 1529, 80° Am. St. Rep. 358, decided September Term 1897

*Turner's Adm'r. v. L. & N. R.R.*, 110 Ky. 879, 62 S.W. 1025, 23 Ky. L. Rep. 340, decided April Term 1901

*Jones' Admr. v. Lay*, 66 S.W. 720, 23 Ky. L. Rep. 2113, decided February 18, 1902

*I.C.R.R. Co. v. Stith, Adm'r.*, 120 Ky. 237, 85 S.W. 1173, 1 L.R.A. (NS) 1014, decided March 25, 1905

*Jewel Tea Co., et al v. Walker's Adm'r.*, 161 S.W. (2d) 66, 290 Ky. 328, decided February 24, 1942

*Vassill's Adm'r. et al y. Scarsella*, 166 S.W. (2d) 64, 292 Ky. 153, decided May 15, 1942

Examination of the Kentucky Digest, Southwestern Reporter, Kentucky Reports and Shepard's Citator reveals that there are no decisions on the point involved later than the two cases last cited.

## Memorandum

## ORDER

(Filed: 9/26/1949)

The general demurrer to the libel as amended is sustained.

MAC SWINFORD, *Judge*.

## MEMORANDUM

(Filed: 9/26/1949)

The general demurrer should be sustained. While this claim for wrongful death is prosecuted in admiralty the law of Kentucky must control and the state wrongful death statute is the authority for the libel. The provisions of a state statute giving or regulating rights of action for death shall not be affected by the enabling admiralty procedure statutes. 41 Stat. 538; 46 F. C. A. 767.

Under the Kentucky authorities the appointment of William Deupree, Jr., as ancillary administrator by the Kenton County Court was void. The amendment setting up his subsequent appointment by the Campbell County Court, shown on the face of the record to be more than a year after the alleged wrongful death cannot relate back to the inception of the libel proceeding and the claim is barred. *Vassil's Admr., etc. v. Scarsella*, 292 Ky. 153; *Jewell Tea Co., et al v. Walker's Admr.*, 290 Ky. 328.

An Order sustaining the general demurrer is this day entered:

MAC SWINFORD, *Judge*.

*Motion***MOTION**

(Filed 9/28-49)

Respondents, Louis Levinson and Mitchell Hall, move for an order granting them judgment upon the pleading herein.

/s/ CHAS. E. LESTER, JR.  
for Lester & Riedinger  
Proctors for Respondent  
Louis Levinson

/s/ W. BAXTER HARRISON  
for Blakely, Moore & Harrison  
Proctors for Respondent  
Mitchell Hall

**AUTHORITY**

The Court's ruling upon the general demurrer.

---

Copy of the within motion mailed  
to each of the following:

/s/ CHAS. E. LESTER, JR.

Deupree & Deupree  
Lawyers Building  
Covington, Kentucky

Gary & Gary  
63 Wall Street  
New York, New York

Nichols, Wood, Marx & Ginter  
900 Traction Building  
Cincinnati 2, Ohio

*Judgment***JUDGMENT**

(Filed: 10/5/1949)

This cause having been heretofore submitted on libelants general demurrer to the libel as amended and the Court having sustained said general demurrer and the libelant having declined to plead further it is now ordered and adjudged that the libel as amended be and the same is hereby dismissed at the cost of the libelant.

To all of which libelant objects and excepts.

MAC SWINFORD, *Judge*.

Mandate.

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

No. 11,104

---

WILLIAM DEUPREE, JR., ETC.

v.

LOUIS LEVINSON et al.

---

**MANDATE**

---

(Filed May 2, 1951)

THE PRESIDENT OF THE UNITED STATES OF AMERICA

*To the Honorable, the Judges of the United States District Court for the Eastern District of Kentucky—GREETING:*

WHEREAS, lately in the United States District Court for the Eastern District of Kentucky, before you or some of you, in a cause between William Deupree Jr., Ancillary Administrator of the Estate of Katherine Wing, deceased, Libelant, and Louis Levinson and Mitchell A. Hall, Respondents, (D. C. No. 364, In Admiralty), a judgment was entered on the 5th day of October 1949, dismissing the libel as amended,

AND WHEREAS, the said Libelants appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Sixth Circuit by virtue of

*Mandate*

an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord, one thousand nine hundred and fifty, the said cause came on to be heard before the said United States Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed and the cause is remanded for further proceedings in accordance with the opinion herein.

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS the Honorable FRED M. VINSON, Chief Justice of the United States, the thirtieth day of April in the year of our Lord one thousand nine hundred and fifty-one.

COSTS—to be recovered  
by appellant

Clerk	\$25.00
Printing record	\$
Attorney	\$
TOTAL	\$25.00

J. W. MENZIES,

*Clerk, United States Court of  
Appeals for the Sixth Cir-  
cuit,*

By CARL W. REUSS,  
*Chief Deputy Clerk.*

*Opinion***OPINION UNITED STATES COURT OF APPEALS  
FOR SIXTH DISTRICT**

(Filed: 12/20/1950)

Decided December 22, 1950

Before HACKS, Chief Judge, ALLEN and McALLISTER, Circuit Judges:

ALLEN, Circuit Judge. The principal question presented by this appeal is whether admiralty cases are controlled by the decisions of state courts. The appeal arises out of a judgment of the United States District Court for the Eastern District of Kentucky which dismissed a libel in admiralty. The libel prayed for damages for the alleged wrongful death of Katherine Wing, a resident of New York State, who died June 19, 1948, as the result of a boat collision on the Ohio River in Campbell County, Kentucky. Appellee Levinson's answer admitted that Miss Wing was a passenger in a motorboat owned and operated by him on the date named. The libel averred that a motorboat owned and operated by appellee Hall collided with the motorboat operated by appellee Levinson, as a result of negligent, willful and malicious conduct on the part of both appellees which caused injuries resulting in decedent's death.

The libel, filed December 7, 1948, set forth that a domiciliary administratrix had been appointed in New York State on October 22, 1948, and that appellant had been appointed ancillary administrator by the Kenton County, Kentucky, court on December 7, 1948. Answers in the nature of general denials were filed March, 23, 1949. Appellees then moved for an order requiring appellant to give security for all costs and expenses which might be awarded against them. On July 7, 1949, after the one-year period

*Opinion*

of limitation had run. (§ 41:5140, K.R.S.), appellant filed an affidavit for leave to sue in forma pauperis, which stated that "Libelant's decedent was possessed of no estate out of which costs or expenses herein can be paid or from which security therefor can be given." Special demurrers were filed upon the ground that the court had no jurisdiction to try the action; that the court had no jurisdiction over the subject matter of the action; and that appellant had not legal capacity to sue. The special demurrers were sustained, but the court granted appellant leave to file an amended libel. On July 29, 1949, an amended libel was filed which alleged that on July 28, 1949, appellant was appointed ancillary administrator in Campbell County, and that the libel was filed by him in such capacity. Other than this new allegation, the cause of action stated in the amended reply was identical with that originally stated. General demurrers were filed to the amended libel on the ground that it did not "state facts sufficient to constitute or support a cause of action." The court sustained the demurrers and dismissed the amended libel for reasons stated in a memorandum, which reads as follows:

"The general demurrer should be sustained. While this claim for wrongful death is prosecuted in admiralty the law of Kentucky must control and the state wrongful death statute is the authority for the libel. The provisions of a state statute giving or regulating rights of action for death shall not be affected by the enabling admiralty procedure statutes. 41 Stat. 538; 46 F.C.A. 767.

Under the Kentucky authorities the appointment of William Deupree, Jr., as ancillary administrator by the Kenton County Court was void. The amendment setting up his subsequent appointment by the Campbell County Court, shown on the face of the

record to be more than a year after the alleged wrongful death cannot relate back to the inception of the libel proceeding and the claim is barred. *Vassill's Admr., etc. v. Scarsella*, 292 Ky. 153; *Jewell Tea Co., et al v. Walker's Admr.*, 290 Ky. 328."

Appellant contends that the District Court erred in holding (1) that decedent had no property within the state for payment of or security for possible costs or expenses; and (2) that the Kentucky decisions cited are controlling and require dismissal of the action. Appellees urge that both the Kentucky decisions and the holdings of the Supreme Court in *Guaranty Trust Co. v. York*, 326 U. S. 99, require affirmance.

As to the first point, the District Court, in ruling on the special demurrers, held that the appointment of an ancillary administrator by the Kenton County court was void because appellant's affidavit in forma pauperis stated that the decedent had no property within the state for payment of or security for possible costs or expenses.

Assuming, but not deciding, that the District Court upon demurrer could consider the affidavits filed with the application to proceed in forma pauperis, this record clearly shows that there is an asset of the estate sufficient to support a grant of letters of administration. It is not necessary that the assets relied upon as a basis for local administration should be tangible. A mere claim or right of action enforceable within the jurisdiction, such as the present death action, will support a grant of administration. This is the established law of Kentucky. *Chesapeake & Ohio Ry. Co. v. Ryan's Admr.*, 138 Ky. 428. In this case the intestate received the injury resulting in his death in Carter County, Kentucky, but died in West Virginia. The Court of Appeals held that the

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Carter County court had jurisdiction to appoint the plaintiff as administrator, notwithstanding the intestate was a non-resident of Kentucky, his death occurred in another state, and he left no property or indebtedness due him in Kentucky other than his right of action. Cf. *Austin's Admr. v. P., C. & St. L. Ry. Co.*, 122 Ky. 304, which held that where a non-resident has been killed in Kentucky by the tort of another, administration upon the estate of the non-resident decedent will be granted in Kentucky, because the statute which gives the right of action to the estate of the decedent for his death "ex necessitate rei" confers jurisdiction by implication to appoint an administrator to prosecute the suit.

In *Brown's Admr. v. L. & N. Rd. Co.*, 97 Ky. 228, 232, the court declared that the county where the decedent was injured and died was the proper county to grant administration; later *Chesapeake & Ohio Ry. Co. v. Ryan's Admr.*, *supra*, at page 430, held that the existence of the injury alone is sufficient. The appointment in Campbell County, then, is supported by the existence of an asset, namely, a cause of action alleged to have arisen in Campbell County.

But since the first ancillary administrator was appointed not in Campbell County, but in Kenton County, the District Court held that the appointment to be void under Kentucky law and not cured by the appointment in Campbell County after the statute of limitations had run. As to this feature of the decision, appellant contends that the District Court erred in its construction of the Kentucky law and in holding that *Vassill's Admr. v. Scarsella*, 292 Ky. 153, and *Jewel Tea Co. v. Walker's Admr.*, 290 Ky. 326, are decisive. He urges that the Kentucky courts have held that defective appointments of this kind are not

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void, but voidable. We think, however, that if the decisions of the Kentucky courts are to be applied in this admiralty case, the judgment of the District Court must be affirmed. The critical question, therefore, is whether the decisions of the state court are controlling, or whether the federal and admiralty law should be applied.

Upon this question we start with the basic proposition that this case is not grounded upon diversity of citizenship. As to diversity cases, "a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State \* \* \*." *Guaranty Trust Co. v. York, supra*, at 108. This was a case which applied the rule of *Erie Rd. Co. v. Tompkins*, 304 U. S. 64 in an equity case involving the applicability of a state statute of limitations. If this holding governs in admiralty cases, the District Court was clearly correct in dismissing the action herein. But, as recently pointed out by the Supreme Court, the decision in *Erie Rd. Co. v. Tompkins* relates "only to the law to be applied in exercise of that [diversity] jurisdiction." *United States v. Standard Oil Co.*, 332 U. S. 301. Compare the statement made by Mr. Justice Jackson in his concurring opinion in *D'Oench, Duhme & Co., Inc. v. Federal Deposit Ins. Corp.*, 315 U. S. 467, 467, that "The Court has not extended the doctrine of *Erie Rd. Co. v. Tompkins* beyond diversity cases."

41 Stat. 538, 46 F. C. A. 767, cited in the District Court's memorandum ((46 U. S. C. §767), sheds no light upon the problem. It relates to actions for death on the high seas, and does not cover actions arising, as this, upon navigable rivers. Viewing the question as an open one, therefore, not ruled upon by the Supreme Court, we look to the practice in the federal and admiralty courts for guidance.

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It is a long-established rule in the federal courts that administrators are permitted to secure and perfect ancillary administration in states where the decedents were non-residents, even after the running of the statute of limitations. A lack of letters of administration may be cured or an objection of want of capacity to sue may be avoided by substitution of the proper party at any time before hearing, and later appointments of this nature relate back and validate the proceedings from the beginning. The leading case to this effect is *Missouri, Kansas & Texas Ry. Co. v. Wulf*, 226 U.S. 570. There plaintiff, as sole beneficiary, brought an action provided for under state law. After the statute of limitations had run, the petition was amended to set up a federal cause of action and was filed by plaintiff both individually and as administratrix. The Supreme Court pointed out that, aside from the capacity in which plaintiff brought the action, there was no substantial difference between the original and the amended petitions, and held that the action was not barred. Here, too, the amendment in no way changes the issues, and in no way prejudices the appellees. Also in the instant case there is no change in the party bringing the action, but simply an amendment as to his capacity. The liberality of amendment in the federal courts goes even farther than this, allowing an actual change in the party plaintiff. *Leman v. Baltimore & Ohio Rd. Co.*, 128 Fed. 191; *Quaker City Cap. Co. v. Fixter*, 4 Fed. (2d) 327 (C. A. 3); *Quin v. Kansas City Southern Ry. Co.*, 8 Fed. Supp. 78; *Jacobs v. Pennsylvania Rd. Co.*, 31 Fed. Supp. 595; *Van Doren v. Pennsylvania Rd. Co.*, 93 Fed. 260 (C. A. 3).

To the same effect, cases involving the statute of limitations are *Hodges v. Kimball*, 91 Fed. 845 (C. A. 4); *Dodge*

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*v. Town of North Hudson*, 188 Fed. 489; *Erie Rd. Co. v. Fritsch*, 72 Fed. (2d) 766 (C. A. 3); *McDonald v. State of Nebraska*, 101 Fed. 171 (C. A. 8); *Salzer v. Consolidation Coal Co.*, 246 Fed. 794 (C. A. 6); cf. *Keystone Coal & Coke Co. v. Fekete*, 232 Fed. 72 (C. A. 6), cert. denied, 242 U. S. 635; *United States v. Powell*, 93 Fed. (2d) 788 (C. A. 4); *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62.

These decisions are based upon the general proposition that in such cases the defect is purely formal or procedural, and that essential justice requires that liberal amendment be permitted. Numerous other decisions could be cited to the same effect, but it is sufficient to refer to 74 A. L. R. 1270, which states:

“While the cases are not in entire harmony, it is usually held that an amendment changing capacity in which a plaintiff sues does not change the cause of action so as to let in the defense of limitations.”

See also 5 Cyc. of Federal Procedure, §§ 1927-1929. It is pointed out repeatedly, as is in fact the case here, that there is no actual change in the cause of action and that the defendants are in no way prejudiced by allowing the amendment. As stated by Mr. Justice Holmes in *N. Y. Central & Hudson River Rd. Co. v. Kinney*, 260 U. S. 340, 346,

“when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied.”

The irregularity relates, the courts hold, not to the cause of action but to the method of enforcing it. A statutory provision requiring action to be brought by an executor or administrator is not an essential part of the right created nor a jurisdictional prerequisite to the court's power to entertain the action. The important part of the law is that which gives a right of action, and not that part which provides who may enforce it; the latter is an incidental provision. *Lang v. Houston, W. S. & P. F. Rd. Co.*, 75 Hun 151. Here the person authorized to enforce the action was the person representing the deceased, § 413.140 (1), K. R. S., and under Kentucky law he is a merely nominal party. *Vaughn's Admr. v. L. & N. Rd. Co.*, 297 Ky. 309. Cf. *Stewart v. Baltimore & Ohio Rd. Co.*, 168 U. S. 445, 449. The substitution of one nominal party for another who has sued in the same capacity is permitted under federal law and relates back to the commencement of the action regardless of the statute of limitations. *Montgomery Ward & Co. v. Callahan*, 127 Fed. (2d) 32 (C. A. 10); *Lopez v. United States*, 82 Fed. (2d) 982, 987 (C. A. 4); *United States v. Powell*, *supra*.

It is significant that the limitation held by the District Court to bar the action is not embodied in the substantive law which creates the right of action. The Kentucky death statute, § 411.130, K. R. S., contains no limitation period. This was pointed out in *Irwin v. Smith*, 150 Ky. 147, 149, and *Finck v. Albers Super Market*, 136 Fed. (2) 191, 192 (C. A. 6). The one-year limitation which appellant concedes applies here is embodied in the general statute of limitations, § 413.140, K. R. S. Such a statute is procedural only. The Kentucky court in *Louisville & Nashville Rd. Co. v. Burkhart*, 154 Ky. 92, 98, rec-

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ognized, with reference to an Indiana employer's liability statute containing no limitation period, that, since the statute that creates the right does not prescribe the period of limitation, the limitation as to time contained in a separate statute is not to be treated as a part of the right. Even in diversity cases, while the substantive right created by statute is controlled by state law (*Erie Rd. Co. v. Tompkins*, *supra*) procedural matters are governed by the law of the forum. How the appellant should proceed and in whose name the action is brought is a matter of form only. *Montgomery Ward & Co. v. Callahan*, *supra*. The court in the *Callahan* case held that although suit had not been filed by the proper party within the period of the Kansas statute of limitations the claim was not barred.

In *Echevarria v. Texas Co.*, 31 Fed. Supp. 596, an administratrix was appointed in the wrong district of Puerto Rico. After the statute of limitations had run, plaintiff was appointed administratrix in the proper district by nunc pro tunc order. The order held the nunc pro tunc order ineffective, but indicated that substitution of a personal representative appointed in the proper district would be permitted although the statute of limitations had run.

The same principles are applied in admiralty cases (*The Horsa*, 232 Fed. 993). Admiralty procedure does not conform to the laws of the various states, but is uniform throughout the country; the practice or procedure is extremely liberal and the rules governing such practice are even less technical than those of equity. 2 C. J. S., Admiralty, § 70.

It has always been the practice in American admiralty courts to allow the parties every opportunity to place their whole case before the court and to enable the court

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to administer substantial justice between the parties. It is therefore the long-established rule that omissions and deficiencies in pleadings may be supplied and errors and mistakes in practice in matters of substance as well as of form may be corrected at any stage of the proceedings for the furtherance of justice. 2 Benedict <sup>on</sup> Admiralty (6th Ed.), 557. "Where merits clearly appear on the record, it is the settled practice, in admiralty proceedings, not to dismiss the libel but to allow the party to assert his rights in the new allegation." Mr. Justice Story, in *The Adeline*, 9 Cranch, 224. *The Miss Nassau*, 55 Fed. (2d) 571 (C. A. 5). Amendments to libels are freely permitted under Rule 23, Rules of Practice in Admiralty and Maritime Cases. *The S. S. Nea Hellis*, 116 Fed. (2d) 803 (C. A. 2); *The Beaconsfield*, 158 U. S. 303; *Boston Ins. Co. v. City of New York*, 130 Fed. (2d) 156 (C. A. 2). Amendments are permitted in admiralty with much more liberality than at common law. *The Hamilton*, 146 Fed. 724 (C. A. 2).

In accordance with these principles it is held that an amendment of a libel dates back to the original filing. 2 Benedict on Admiralty, 562. This is true even though the statute of limitations has intervened. *The Pequot*, 4 Fed. (2d) 745; *The Resolute*, 17 Fed. (2d) 15 (C. A. 5); *Weldon v. United States*, 65 Fed. (2d) 748 (C. A. 1). In the *Weldon* case an order of the District Court denying a motion for substitution of libellant was reversed, although the statute of limitations had run. The court held that the decision of the Supreme Court in *Missouri, Kansas & Texas Ry. Co. v. Wulf*, *supra*, was decisive of the case, pointing out that "Cases in which the defendant was not brought into court until after the period of limitation had expired stand on a very different footing. See *Davis, Agents, v. Cohen & Co., Inc.*, 268 U. S. 638. . . ."

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A recent admiralty case to the same effect is *Bochantin v. Inland Waterways Corp.*, 9 F. R. D. 592. There a decedent had been drowned in the Mississippi River at St. Louis, Missouri. The Missouri wrongful death statute contains a one-year limitation provision, and in that particular the case was stronger against the plaintiff than the instant case, for the limitation might be considered to be part of the right. The death occurred February 27, 1948, and suit was instituted in admiralty by the administratrix February 26, 1949. The respondent objected to the libel on the ground that the statute provided that decedent's minor children and not the administratrix, should act as libelants. After the statute had run, the administratrix moved to amend by substituting herself as libelant in the capacity of next friend of the minor children. The court said: "All parties agree if state law is to control, the forum being Missouri, libelant must be denied the right (to amend,") citing *Goldschmidt v. Pevely Dairy Co.*, 341 Mo. 982. The court, pointing out that all that was sought by the libelant was to change her representative capacity from administratrix to next friend, and that no change whatever was made in the charge upon which recovery was sought, declared that the rule of *Erie R.R. Co. v. Tompkins* was inapplicable, and that under the admiralty rules, equity powers incidental to admiralty, and the federal decisions on substitution, the application should be granted to safeguard the administration of justice.

We conclude that the state law is not controlling. Since both federal law and admiralty law permit the procedural amendment sought to be made, we think the District Court erred in dismissing the action.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

*Order Setting Aside Judgment*

UNITED STATES DISTRICT COURT  
 EASTERN DISTRICT OF KENTUCKY  
 COVINGTON

WILLIAM DEUPREE, JR., Ancillary Administrator of  
 the Estate of Katherine Wing, Deceased,

*Libelant,*

v.

LOUIS LEVINSON and MITCHELL A. HALL,

*Respondents.*

**ORDER SETTING ASIDE JUDGMENT AND RULING ON  
 DEMURRERS AND OVERRULING GENERAL  
 DEMURRERS TO AMENDED LIBEL**

(Entered 5/15/51)

Pursuant to the Mandate and Opinion of the United States Court of Appeals for the Sixth Circuit which were ordered filed and noted of record in this court on May 2, 1951; the judgment dismissing the libel as amended heretofore entered herein on October 5, 1949, is hereby set aside and vacated, the order sustaining the general demurrer to the libel as amended heretofore entered herein on September 26, 1949, is hereby set aside and vacated, and the general demurrers of Respondent Levinson and of Respondent Hall to the amended libel, each filed herein on September 9, 1949, are overruled.

Respondents are granted until May 30, 1951, to plead to the amended libel.

MAC SWINFORD, *Judge.*

*Answer of Respondent, Levinson*

**SEPARATE ANSWER OF RESPONDENT,  
LOUIS LEVINSON, TO LIBEL AS AMENDED**

(Filed 5/29/51)

*To the Honorable Judges of the United States District Court for the Eastern District of Kentucky sitting in Admiralty at Covington is hereby tendered for filing the separate answer of the respondent, Louis Levinson, to the libel and complaint as amended of William Deupree, Jr., ancillary administrator of the estate of Katherine Wing, deceased.*

(1) Respondent, Louis Levinson, for answer herein to the libel and complaint as amended of William J. Deupree, Jr., as the ancillary administrator of the estate of Katherine Wing, deceased, says that he is without knowledge or information sufficient to form a belief as to the truth of the averments in article (1) of said libel and complaint as amended and therefore denies the allegations thereof.

(2) Admits that on June 19, 1948, one Katherine Wing was a passenger in a motor boat owned by this respondent and except for such admission of the allegations contained in article (2) of said libel and complaint as amended denies the several allegations thereof.

(3) Denies the allegations of article (3) of said libel and complaint as amended.

(4) Denies the allegations of article (4) of said libel and complaint as amended.

(5) Respondent, Louis Levinson, says that the alleged cause of action set forth in the libel and complaint as amended accrued to libelant, if at all, more than one year next before the filing of the libel and complaint and the amended libel and complaint, and said cause of action, if any there was, or is, is barred by the statute of limitations

*Answer of Respondent. Levinson*

in such cases made and provided, and this respondent relies upon said statute of limitations in bar of libelant's right to recovery for any of the matters set forth in the libel and complaint and the amended libel and complaint.

(6) Respondent, Louis Levinson, for further answer to the libel and complaint as amended, says that if libelant's intestate was injured, causing her death and damaging her estate, as alleged in the libel and complaint as amended, that said alleged injuries and resulting damages to said intestate's estate were caused and brought about by the negligence of said intestate contributing thereto and that but for said negligence on her part said injuries would not have been sustained by her or damages resulting to said estate, and respondent pleads and relies upon these facts as a bar to libelant's right to recover against him.

(7) Further answering, respondent, Louis Levinson, says that at the time of the collision of said motor boats and for several hours prior thereto said intestate was riding in the motor boat of this respondent and she and respondent were then and there and during said times engaged in a joint adventure or enterprise in the operation of said motor boat for their mutual pleasure and if said intestate sustained injuries in the course of said joint enterprise or adventure and which resulted in her death, then such injury and resulting death was among the risks ordinarily incident to said joint adventure or enterprise and for which this respondent is in no wise responsible; that the manner of respondent's operation of his said motor boat at the time and place alleged in the libel as amended and for several hours prior thereto, was well known to said intestate at the time libelant claims she received said injuries resulting in her death and that after having and acquiring such knowledge, said intestate continued to par-

*Answer of Respondent, Levinson*

ticipate in said joint adventure or enterprise and did so at her own risk, voluntarily and without any compulsion by this answering respondent.

(8) For further answer respondent, Louis Levinson, says that the collision between the two motor boats was caused and brought about by the sole negligence of his co-respondent, Mitchell A. Hall, and said collision of said boats and the resulting injuries and death of said intestate was unavoidable upon the part of this respondent.

(9) It appears of record in this court that libelant filed his libel and complaint in admiralty case No. 441 on the 5th day of January, 1950, against this respondent and his co-respondent, Mitchell A. Hall, and that said libel in said case No. 441 sets forth the identical cause of action alleged herein in case No. 364 and in said case No. 441 issue was joined by appropriate pleadings and said cause is ready for trial. Respondent makes the entire record in case No. 441 a part hereof by reference thereto and pleads and relies upon same in abatement of the cause of action being asserted in case No. 364.

(10) It is apparent upon the face of the record herein that this court has no jurisdiction to try the within cause, that this court has no jurisdiction over the subject matter and that libelant has not legal capacity to sue.

(11) The libel as amended herein does not state facts sufficient to constitute or support a cause of action.

WHEREFORE respondent, Louis Levinson, prays that the libel and complaint as amended be dismissed at the cost of libelant.

LESTER AND RIEDINGER,  
Proctors for Respondent,  
Louis Levinson  
8 East Fifth Street  
Newport, Kentucky

*Answer of Respondent, Levinson*

Chas. E. Lester, Jr., says that he is a member of the law firm of Lester and Riedinger, proctors for respondent, Louis Levinson, that said respondent is now absent from the Eastern District of Kentucky and from the Commonwealth of Kentucky and that the allegations contained in the foregoing separate answer of said respondent are true, as this affiant verily believes.

CHAS. E. LESTER, JR.

Subscribed and sworn to before me by Chas. E. Lester, Jr., this the 29th day of May, 1951.

Notary Public,  
Campbell County, Kentucky

My commission expires:  
September 3, 1952.

To:

NICHOLS, WOOD, MARX & GINTER

Attorneys at Law

900 Traction Building

Cincinnati, Ohio

GARY & GARY

Attorneys at Law

63 Wall Street

New York, New York

DEUPREE & DEUPREE

Attorneys at Law

105 East 3rd Street

Covington, Kentucky

BLAKELY, MOORE & BLAKELY

Attorneys at Law

105 East 3rd Street

Covington, Kentucky

*Answer of Respondent; Hall*

Please take notice that an answer of which the within is a copy was this day duly filed in the within entitled cause in the office of the clerk of the within named court.

Dated at Covington, Kentucky, this the 29th day of May, 1951.

LESTER AND RIEDINGER,  
Proctors for Respondent,  
Louis Levinson  
8 East Fifth Street  
Newport, Kentucky

**SEPARATE ANSWER TO LIBEL AS AMENDED OF  
RESPONDENT, MITCHELL A. HALL**

(Filed 5/29/1951)

*To the Honorable Judges of the United States District Court for the Eastern District of Kentucky sitting in Admiralty at Covington, is hereby tendered for filing the separate answer of the Respondent, Mitchell Hall, to the libel and complaint, as amended, of William Deupree, Jr., ancillary administrator of the estate of Katherine Wing, deceased.*

(1) Respondent, Mitchell A. Hall, for answer herein to the libel and complaint as amended of William Deupree, Jr., as the ancillary administrator of the estate of Katherine Wing, deceased, says that he is without knowledge or information sufficient to form a belief as to the truth of the averments in Article (1) of said libel and complaint, as amended, and therefore denies the allegations thereof.

(2) Admits that on June 19th, 1948, one Katherine Wing was a passenger in a motor boat owned by Respondent, Louis Levinson; admits that this Respondent was the owner of a motor boat which was operated and piloted

*Answer of Respondent, Hall*

at the time and place mentioned in the libel and complaint, as amended, and except for such admission of the allegations contained in Article (2) of said libel and complaint, as amended, denies the several allegations thereof.

(3) Denies the allegations of Article (3) of said libel and complaint, as amended.

(4) Denies the allegations of Article (4) of said libel and complaint, as amended.

(5) Respondent, Mitchell A. Hall, says that the alleged cause of action set forth in the libel and complaint, as amended, herein accrued to libelant more than one year next before the filing of the libel and complaint and the amended libel and complaint herein, and said cause of action, if any there was, or is, is barred by the Statute of Limitations in such cases made and provided, and this Respondent relies upon said Statute of Limitations in bar of libelant's right to recover for any of the matters set forth in the libel and complaint and the amended libel and complaint herein.

(6) Respondent, Mitchell A. Hall, for further answer to the libel and complaint, as amended, states that if libelant's intestate was injured, causing her death and damaging her estate as alleged in the libel and complaint, as amended, that said alleged injuries and resulting damages to libelant's intestate's estate were caused and brought about by the negligence of libelant and petitioner's intestate contributing thereto and but for said negligence on her part the collision would not have happened or any of the alleged injuries or damages resulted to libelant's intestate. The Respondent pleads and relies upon these facts as a bar to libelant's right to recover against him.

(7) The Respondent, Mitchell A. Hall, for further answer states that at the time of the collision between the

*Answer of Respondent, Hall*

two motor boats, libelant's intestate was riding in a motor boat owned and operated by Respondent, Louis Levinson, and that the said Louis Levinson and Libelant's intestate were then and there engaged in a joint enterprise on a trip for the joint pleasure of libelant's intestate and the said Louis Levinson and that said motor boat was driven and operated by said Louis Levinson under the joint control of the driver and operator and libelant's intestate and that said collision was caused and brought about by the negligence of said Louis Levinson while acting as herein set out contributing thereto and but for said negligence the collision would not have occurred or any of the alleged injuries or damages resulting to plaintiff's intestate or her estate.

(8) Respondent, Mitchell A. Hall, for further answer states that the collision between the two motor boats were caused and brought about by the sole negligence of Louis Levinson, the driver and operator of the motor boat in which libelant's intestate was riding and was unavoidable on the part of this Respondent. He pleads and relies upon these facts as a bar to libelant's right to recover against him.

WHEREFORE Respondent, Mitchell A. Hall, prays that the libel and complaint, as amended, be dismissed with costs.

MARION W. MOORE

For Blakely, Moore and Blakely  
Proctors for Respondent,  
Mitchell A. Hall  
106 East Third Street  
Covington, Kentucky

*Motion to Strike from Answers.*

Mitchell A. Hall says that he is one of the Respondents herein and that the allegations contained in the foregoing separate answer are true.

MITCHELL A. HALL.

Subscribed and sworn to before me by Mitchell A. Hall this 29th day of May, 1951.

VIRGINIA BAGBY

Notary Public, Kenton County, Ky.

My commission expires: February 13, 1955.

**MOTION TO STRIKE FROM ANSWERS  
TO AMENDED LIBEL**

(Filed 6/29/1951)

Now comes the libelant and moves to strike from the answers to the amended libel the following:

1. From the separate Answer of Respondent Louis Levinson to the Libel as Amended the entire paragraph (5) of said answer, which avers that the cause of action is barred by limitations, for the reason that said defense has been heretofore raised herein by said respondent and has been decided contrary to his contention by the United States Court of Appeals for the Sixth Circuit, which decision is conclusive of this issue and binding upon this court and the parties hereto as res judicata and the law of the case.

2. From the said answer of respondent Levinson the entire paragraph (6) of said answer, which attempts to plead contributory negligence upon the part of libelant's decedent, for the reason that said paragraph sets forth a conclusion only and fails to allege any operative facts, and for the further reason that the claim of contributory

*Motion to Strike from Answers*

negligence is inconsistent with the allegation in paragraph (8) of said answer of sole negligence of respondent Hall.

3. From the said answer of respondent Levinson the entire paragraph (7) of said answer, which attempts to plead a joint enterprise or adventure engaged in by decedent and said respondent, for the reasons that no operative facts are pleaded in said paragraph to indicate a joint enterprise or adventure, that conclusions only are set forth, and that the claim of joint enterprise or adventure constitutes no defense and is inconsistent with the allegation of sole negligence of respondent Hall in paragraph (8) of said answer.

4. From the said answer of respondent Levinson the entire paragraph (8) of said answer, which attempts to plead sole negligence of respondent Hall, for the reason that said paragraph sets forth a conclusion only and fails to allege any operative facts, and for the further reasons that the admissions in said paragraph of the collision between the two motor boats and the resulting injuries and death of decedent are inconsistent with and contrary to the denial of said collision, injuries, and death contained in paragraph (3) of said answer, and that pleading sole negligence of another respondent is surplusage.

5. From the said answer of respondent Levinson the entire paragraph (9) of said answer, which attempts to plead in abatement of this case a pending case number 441 on the admiralty docket of this court, for the reason that said case number 441 was filed prior to the decision of the Court of Appeals herein, to protect libellant's rights, and has been, subsequent to said decision and the filing of said answer herein, dismissed and is not now pending.

6. From the said answer of respondent Levinson the entire paragraph (10) of said answer, which avers lack

*Motion to Strike from Answers*

of jurisdiction in this court to try this case, lack of jurisdiction in this court over the subject matter, and want of capacity in libelant to sue, for the reason that said defense has been heretofore raised herein by said respondent and has been decided contrary to his contention by the United States Court of Appeals for the Sixth Circuit, which decision is conclusive of this issue and binding upon this court and the parties hereto as res judicata and the law of the case.

7. From the said answer of respondent Levinson the entire paragraph (11) of said answer, which avers that the amended libel does not state facts sufficient to constitute or support a cause of action, for the reason that said defense has been heretofore raised herein by said respondent and has been decided adversely to his contention by the United States Court of Appeals for the Sixth Circuit, which decision is conclusive of this issue and binding upon this court and the parties hereto as res judicata and the law of the case.

8. From the Separate Answer to the Libel as Amended of Respondent Mitchell A. Hall the entire paragraph (5) of said answer, which avers that the cause of action is barred by limitations, for the reason that said defense has been heretofore raised herein by said respondent and has been decided contrary to his contention by the United States Court of Appeals for the Sixth Circuit, which decision is conclusive of this issue and binding upon this court and the parties hereto as res judicata and the law of the case.

9. From the said answer of respondent Hall the entire paragraph (6) of said answer, which attempts to plead contributory negligence upon the part of libelant's decedent, for the reason that said paragraph sets forth a

*Motion to Strike from Answer*

conclusion only and fails to allege any operative facts, and for the further reason that the claim of contributory negligence is inconsistent with the allegation in paragraph (8) of said answer of sole negligence of respondent Levinson.

10. From the said answer of respondent Hall the entire paragraph (7) of said answer, which attempts to plead a joint enterprise engaged in by decedent and respondent Levinson and contributory negligence upon the part of said Levinson, for the reasons that conclusions only are set forth in said paragraph that no operative facts are alleged, and that the claims of joint enterprise and contributory negligence of respondent Levinson are inconsistent with the allegations in paragraph (8) of said answer of sole negligence of respondent Levinson.

11. From the said answer of respondent Hall the entire paragraph (8) of said answer, which attempts to plead sole negligence of respondent Levinson, for the reasons that said paragraph sets forth a conclusion only and fails to allege any operative facts, that it is surplusage and that the admission in said paragraph of the collision between the two motor boats is inconsistent with and contrary to the denial of said collision contained in paragraph (3) of said answer.

12. Libelant also moves to strike the demand for a jury trial appended to the said answer of respondent Hall for the reason that there is no right to a trial by Jury in this admiralty suit.

NICHOLS, WOOD, MARX & GINTER

DEUPREE & DEUPREE

GAREY & GAREY

Proctors for Libelant

*Order***ORDER**

(Entered: 7/18/1951)

The Libelant's motion to strike paragraph (5) of the answer of the respondent Louis Levinson to the libel as amended, is sustained and that paragraph is Ordered stricken.

The Motion to strike the entire paragraph (6) of the answer of the respondent Levinson is overruled.

The Motion to strike paragraph (7) from the answer of the respondent Levinson is overruled.

The Motion to strike paragraph (8) from the answer of the respondent Levinson is sustained and the paragraph is Ordered stricken.

The Motion to strike the entire paragraph (9) from the answer of the respondent Levinson is sustained and the paragraph is Ordered stricken.

The Motion to strike paragraph (10) from the answer of the respondent Levinson is sustained and the paragraph is Ordered stricken.

The Motion to strike paragraph (11) of the answer of the respondent Levinson is sustained and the paragraph is Ordered stricken.

The Motion to strike paragraph (5) from the answer of the respondent Hall is sustained and the paragraph is Ordered stricken.

The Motion to strike the entire paragraph ((7) of the answer of Respondent Hall is overruled.

The Motion to strike paragraph (8) of the answer of Respondent Hall is sustained.

The Motion to strike the demand for jury trial appended to the answer is sustained.

MAC SWINFORD, *Judge*

*Libelant's Demurrer***LIBELANT'S DEMURRER TO PARAGRAPH (7) OF  
ANSWER OF RESPONDENT LEVINSON**

(Filed: 7/30/1951)

Now comes the libelant and demurs to paragraph (7) of the Separate Answer of Respondent Louis Levinson to the Amended Libel on the ground that said answer fails to state a defense to the cause of action pleaded in said amended libel.

NICHOLS, WOOD, MARX & GINTER  
DEUPREE & DEUPREE  
GAREY & GAREY

Proctors for Libelant

**ORDER**

(Entered: 9/26/1951)

This case came on for hearing on Motions, came the respondent, Louis Levinson, and moved the Court for a continuance of this case. In support of the Motion he filed the Affidavit of his Proctor, Charles E. Lester, the Court being advised the Motion for a Continuance is overruled to which ruling of the Court the Respondent Louis Levinson excepts.

It is further Ordered that the Libelant's demurrer to Paragraph 7 of the answer of the respondent, Louis Levinson, is sustained, to which ruling of the Court the respondent Louis Levinson excepts.

The Court in overruling the Motion for Continuance advised counsel that upon a hearing of the case, should it be determined by the Court that the testimony of the witness Eugene Thomas was material to the issue or issues involved, that he would give counsel a reasonable

*Reply*

time to produce the testimony either orally or by way of deposition or interrogatories of the witness Thomas; a reasonable time to be considered not more than 90 days of date of trial.

By agreement of parties each party is given exceptions to rulings of the Court on all matters heretofore ruled upon and determined adversely to the party.

The case is set for trial by the Court at Covington, Ky., Federal Court Room on Wednesday, November 28, 1951, at 10:30 A. M.

MAC SWINFORD, *Judge*

**REPLY**

(Filed: 10/1/1951)

Now comes the libelant and, for reply to paragraphs (1), (2), (3), (4), and (6) of the Separate Answer of respondent Louis Levinson to libelant's Amended Libel and to paragraphs (1), (2), (3), (4), (6), and (7) of the Separate Answer of respondent Mitchell A. Hall, denies each and every allegation contained in said paragraphs except such allegations as are admissions of averments contained in said Amended Libel.

NICHOLS, WOOD, MARX & GINTER  
DEUPREE & DEUPREE  
GAREY & GAREY

Proctors for Libelant & Petitioner

STATE OF KENTUCKY }  
COUNTY OF KENTON } ss:

William Deupree, Jr., being first duly sworn, says that he is the libelant and petitioner in this action and that

*Order*

the facts set forth in the foregoing reply are true to his information and belief.

/s/ WILLIAM DEUPREE, JR.

Sworn to before me and subscribed in my presence this 1st day of October, 1951:

Notary Public, Kenton County, Ky.

**ORDER**

(Entered: 11/29/1951)

Pursuant to order heretofore entered, this cause came on for trial before the Court without the intervention of a jury.

Came the Libelant, in person and by Proctor, Nichols, Wood, Marx & Ginter; the respondent, Louis Levinson, not present in person but represented by Charles E. Lester, as Proctor; the respondent Mitchell A. Hall, in person and by Proctors, Blakely, Moore & Blakely.

The Court heard the opening statements of Proctors, and the evidence introduced.

IT IS ORDERED by the Court that the trial of this cause be continued until November 30, 1951—9 A. M.

MAC SWINFORD, Judge

**ORDER**

(Entered: 11/30/1951)

Pursuant to order this cause came on for further trial. Came the interested parties.

The Court heard the evidence introduced. Came the Libelant by Proctor, and offered for filing the Deposition of Mitchell A. Hall and the Court over the objections of

*Order*

Proctors, Blakely, Moore & Blakely, ordered the deposition filed and noted of record.

The case proceeded with the introduction of witnesses for the Libelant.

At the close of the evidence for the Libelant, came the Respondents, Louis Levinson and Mitchell A. Hall and each of them and moved the Court for judgment dismissing the Libel. The Court being advised, overruled the motion.

Came then the respondents and each of them and offered evidence, which included the deposition of the Respondent, Louis Levinson. The Libelant objected to the offering of the deposition of Louis Levinson on the ground that it had heretofore been offered in evidence by the Libelant. The objection is overruled and the deposition is to be considered as part of the evidence in the case.

At the conclusion of the evidence for the Respondents came the Libelant and offered certain evidence in rebuttal.

At conclusion of all the evidence came Respondents and each of them and renewed their motion for a Judgment dismissing the Libel. The Court being advised, the motion is overruled.

Exceptions are given to the respective parties on all rulings contrary to their respective motions throughout the entire record.

It is stated by Charles Lester, Proctor for Respondent, Louis Levinson that he desires to offer testimony of one, Eugene G. Thomas, an eye witness to the collision of the two motor boats and asked the Court to allow him a reasonable time in order to produce the witness in accordance with the terms of an order of date Sept. 26, 1951. It is reported to the Court that the witness can be obtained within the next thirty days.

*Transcript of the Court's Opinion*

This case is assigned for final submission and oral argument for January 14, 1952—1:00 P.M., EST in the Federal Court Room, Covington, Kentucky.

MAC SWINFORD, *Judge*

**TRANSCRIPT OF THE COURT'S OPINION**

(Entered 1/15/1952)

THE COURT: Insofar as the question of law, which is argued by counsel for the respondents, is concerned, the Court concludes that the law of the case is stated in the opinion of the Court of Appeals and the mandate which came down from that court in reversing the decision of this court which held that the law of Kentucky giving the right of action was subject to the law of limitation on such actions in Kentucky. The Court of Appeals laid down the rule that this court was in error on that and consequently, as I see it, the only question to determine here is whether or not there was negligence as to either or both of these respondents and if that negligence, if any, was the proximate cause of the loss to the estate of the decedent, Kitty Wing; and the further question, in the event the court finds that there was such negligence, within the meaning of the law under the interpretation of the rules of admiralty and the law applicable to admiralty cases of this character, the amount that should be awarded in damages.

The court is of the opinion that it is a fair and reasonable inference from the evidence and there is direct proof of the fact that each of these respondents was negligent and that as they were joint tort-feasors they should stand the amount of damages which the court will award to this estate.

*Transcript of the Court's Opinion*

In the first place, the evidence is clear to me that these two motor boats were out there for a good time. It wasn't a commercial enterprise; it wasn't somebody on his business, but they were out there for the express purpose of pulling behind them these ski riders or these surf board riders. From the evidence, it appears that it was necessary that they make a certain speed in order to accomplish what they were out there to do. It is also shown conclusively from the evidence that the Levinson boat had two boys—13 or 14 years old—on behind on skis or surf boards and that they had been having some trouble in staying on the surf boards. It was all in fun and all a part of the party which they were having, but the driver of the boat, Louis Levinson, one of the respondents, was interested in watching his son and his son's companion on the back of the boat which he was driving or which he was piloting. There was evidence also that the Hall boat had this surf board rider or a ski rider on behind it and Mr. Hall, the respondent, who was piloting the boat was watching him to a certain extent.

I am unable to see how this accident could have possibly occurred if these pilots or either of them had been properly attending to the job of driving his boat. The Ohio River is more than a half mile wide at this point. They were fully aware of each other; they had been on the river there for some little time that afternoon. As I recall, one of the questions asked Mr. Levinson in the deposition which I have before me as part of the record on cross examination, he said that these boats had been playing around for about two hours. I am not trusting my memory sufficiently to state that as a fact and I am not finding that as a fact, but certainly it is not denied that these two operators of the boats were fully aware

*Transcript of the Court's Opinion*

of the other's presence and what each of them were doing. One of the witnesses who testified in the case said that the boats had come close to each other that afternoon; that they had come so close as to throw spray on her—a matter of a few feet from each other at a high rate of speed.

There is no evidence that there was any other boat on the river at that time in that locality. As far as this record is concerned it is barren of evidence that there was any other thing that might obstruct the view or might obstruct the maneuvering or the guiding of these boats at any time. They could have each done what they were doing without taking any chances of collision whatsoever. Instead of that they were, apparently, enjoying the sport of, according to the testimony of one of the witnesses, coming very close to each other and getting the thrill or the excitement or whatever it might be of giving the surf riders the waves from each other's boats. There is testimony that that is one of the things that a surf rider seeks.

The court must conclude that each of these boat operators and each of these respondents was negligent. Mr. Hall said that he was coming up the river; that he saw the other boat and if the other boat had kept its straight course that each of them could have passed without any possibility of a collision. The occupants of the other boat who testified said that the Levinson boat had gone upstream and made an arc or a circle and started back downstream, but had headed across the river. The diagrams that were drawn on the blackboard during the trial of the case and on the paper here show that this boat was headed toward the Ohio shore; from the time it made this arc it never actually straightened out of the arc. Certainly Mr. Hall should have taken cognisance of that fact. If he had

*Transcript of the Court's Opinion*

kept to his right or his starboard side, he should have known or been aware of the fact that with this boat heading almost diagonally across in front of his bow, that there was going to be a collision. He had ample time to avoid that collision, but he didn't do that. There is some testimony here that he had had a drink or two, but I can't assume that he was intoxicated; I am not holding that at all. There is certainly no basis of evidence for the court to reach that conclusion, but the court must conclude that he was looking behind him and didn't see the other boat. That is the only conclusion that could possibly be reached. It is not like two automobiles meeting on a highway where, at best, if everyone watches his business of driving, they are bound to come within a few feet of each other; on the average roads, except four lane highways where there is a parkway in between or a reasonable width in between, they must necessarily come within a few feet of each other. But here was a half mile or more of river which was available to both of the operators of these boats; instead of that they were trying to occupy the same place at the same time. They succeeded in doing that to the loss of the decedent's estate and the killing of Kitty Wing, who could not in anywise be called contributorily negligent or have anything to do with defending or protecting herself at the time.

On the other hand, from the evidence here, when Levinson made this arc or made this turn, he headed for the Ohio shore. He saw the other boat coming; he talked and discussed with his wife or she discussed with him the fact that Hall's boat was coming upstream. Notwithstanding that fact he proceeded in the same direction until he came in contact with him.

*Transcript of the Court's Opinion.*

Aside from the violation of any of the navigation rules or regulations of the river, under the statutory requirements of the parties, the court must necessarily find that these two operators of these boats were not watching with ordinary care required of a person operating a boat. Neither of them were, because it could not have happened had either of these gentlemen been alert to the situation which it was their duty to see.

There is not much use in going into this evidence in detail. Much of this evidence was depicted to the court by diagrams on the blackboard by the witnesses and by diagrams drawn, as I recall, on pieces of paper here during the trial. There wasn't very much conflict in the evidence. Each boat knew of the other's presence, but instead of avoiding the collision they rather seemed to ignore the facts and circumstances of the danger which resulted in the collision, by not trying sufficiently, under the law, to avoid it.

It will be the judgment of the court that they were each negligent and the damages awarded shall be awarded against both of them.

As far as the amount is concerned, it is always a problem for either a court or a jury where it is determined that there is wilful negligence. There is nothing in the facts of any kind of contribution on the part of the deceased to even mitigate the damages; that makes it even more difficult. Sometimes there are recoveries where there are some mitigating circumstances; although not in law sufficient to call contributory negligence, there are circumstances which justify a jury or a court in taking them into account in fixing the amount of damages.

This young girl was evidently very talented. She was a high school graduate; she had taken courses in dancing

*Transcript of the Court's Opinion*

in New York. She had been sufficiently successful in her profession to become an entertainer in well recognized places of entertainment. Whether or not she would have gone on to become what might be called a "headliner" or whether she would have remained more or less an obscure dancer is so highly speculative that the court would not undertake to say. She might have become as well known as some of the famous dancers of the screen, stage and television; on the other hand, she might never have gotten any farther than she already was. As a matter of fact, very few of them do go very far in their art or profession. But she was earning when she worked fifty to seventy dollars per week. She didn't work all the time; the nature of her work was such that she wasn't engaged all the time. Her mother and her brother testified about that. Another thing to consider is the character of her profession; while we can single out certain artists or dancers who have gone on for years, it must be recognized that time takes its toll of girls in the entertainment world. Age is one of the circumstances they have to consider when they take up that profession. As they get older they are less wanted and less desirable for certain kinds of entertainment such as dancing and personal appearances, as a rule.

This girl hadn't reached her full maturity as far as her art was concerned; she certainly had a good many years ahead of her. What that might have been is so highly speculative that the court, as I say, is always faced with a difficulty in assessing damages. It is possible that this girl could have gone on and earned \$250,000; on the other hand, she might not have earned but a few hundred dollars or a few thousand dollars. During the time of that earning she was, of course, subject to have certain expen-

*Findings of Fact, Conclusions of Law*

ditures; to take lessons and certain expenses to which she must necessarily be put to achieve perfection in her profession. I do not feel that it is necessary to go into any further discussion on this, because we would not be any further along if we discussed the law on that subject for another hour.

It seems to me that a fair and reasonable sum which her estate should be entitled to recover would be the sum of thirty thousand dollars. I think that is a fair sum; it is a reasonable and just verdict based on the evidence. That will include any funeral expenses which she had or any other expenses which may have been in the prayer of the complaint. That will be the judgment of the court.

I, Virginia Prather, Official Reporter, U. S. District Court, Eastern and Western Districts of Kentucky, do certify that the foregoing constitutes a true, full and accurate transcript of the Court's opinion in case No. 364, In Admiralty, *William Deupree, Jr., etc. vs. Louis Levinson and Mitchell Hall*, in the United States District Court at Covington, Kentucky, January 14, 1952, before His Honor, Mac Swinford, Judge of said Court.

IN TESTIMONY WHEREOF, Witness my official hand as reporter aforesaid, this the 15th day of January, 1952.

VIRGINIA PRATHER,  
Official Reporter

**FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND DECREE**

(Filed and Entered: 2/1/1952)

This cause came on for further hearing on January 14 and February 1, 1952, pursuant to prior order of the court and, no party desiring to offer further evidence,

*Findings of Fact*

was submitted to the court after arguments of counsel for all parties. Whereupon, the court, after consideration of the pleadings and the evidence finds in favor of the libelant and against the respondents, jointly and severally, in the sum of \$30,000.00, and the court hereby makes the following findings of fact, conclusions of law, and decree:

**FINDINGS OF FACT**

1. Katherine Wing, also known as Kitty Wing, died intestate, a resident of New York County, State of New York, on June 19, 1948.

2. On or about October 22, 1948, Rose Wing qualified as administratrix of the estate of Katherine Wing in the Surrogate's Court of New York County, New York, and has continued until the present as such administratrix.

3. On or about December 7, 1948, libelant, William Deupree, Jr., qualified as ancillary administrator of the estate of said decedent in the County Court of Kenton County, Kentucky, and on or about July 28, 1949, libelant qualified as ancillary administrator of the estate of said decedent in the County Court of Campbell County, Kentucky, and is still acting as such ancillary administrator under the appointment of said Campbell County Court.

4. On the afternoon of June 19, 1948, Katherine Wing was a guest passenger with the knowledge and consent of respondent Louis Levinson, on a twenty-two foot, eleven passenger pleasure craft then owned and operated by said Levinson on the Ohio River in Campbell County, Kentucky. There were seven passengers on the boat in addition to Miss Wing, and respondent Levinson, while Levinson's young son and another boy were being towed behind the boat respectively on an aquaplane and water

*Findings of Fact*

skis. The boat had been cruising about the river towing the aquaplane and water skis for about one-half hour preceding the collision which is the subject of this suit, and had been intermittently on the river during most of the afternoon.

5. At the time of said collision respondent Levinson was operating his boat in a general downstream direction on a circular course, pointing diagonally toward the Ohio shore, near the Cincinnati Yacht Club, which is located on the northeast shore of the Ohio River in Hamilton County, Ohio.

6. During the afternoon a twenty-five foot, nine passenger 140 horsepower Chris Craft Sportsman motorboat owned by respondent Mitchell A. Hall was being operated by said Hall on the same portion of the river, with two passengers on board and towing a man on an aquaplane. The boat had been intermittently on the river during the afternoon and had been on the river at least ten minutes before the occurrence of the collision in question.

7. During the afternoon the respondents had been enjoying the sport of operating their boats in close proximity to one another, and each respondent was aware of the identity of the other and of the presence of the other boat in the same river area.

8. Immediately prior to the collision Hall was operating his boat in a general upstream direction at a speed in excess of thirty miles per hour.

9. Both boats were equipped with electrically operated audible signalling devices, but neither boat operator sounded any signal prior to the collision.

10. While the boats were being so operated, they collided with one another, the bow of Hall's boat striking

*Findings of Fact*

the port side of Levinson's boat several feet aft of the bow stem and entering said boat far enough to break the steering wheel of the boat and the leg of respondent Levinson.

11. Respondent Levinson's boat sank within a few minutes and respondent Hall's boat was leaking so badly after the collision that it had to be beached.

12. Miss Wing was never seen alive by anyone after the collision. Examination of her body upon recovery showed that she had received a severe blow upon the head which fractured her skull; that there were fragments of wood driven into her brain; that such a blow would cause almost instantaneous death, and that there was no water in her lungs. All other occupants of both boats and the persons being towed behind the boats were accounted for immediately after the collision. Marcia Flynn, one of the passengers in Levinson's boat, received serious injuries when she was propelled from the boat by the impact and came in contact with one of the two boats as she was precipitated into the water.

13. At the time of the collision it was daylight and visibility was good. The river was about one-half mile wide at the point where the collision occurred. There were no other boats in the vicinity, and there was nothing to obstruct the vision of the respondents or the maneuvering of their boats.

14. In the moment preceding the collision, respondent Levinson, according to his own testimony, did not observe the Hall boat until the two boats were within thirty to fifty feet of one another.

15. Just prior to the collision respondent Hall observed the Levinson boat moving downstream in front of him

*Findings of Fact*

and to his right at a distance of five hundred to eight hundred feet. He then looked away and did not again observe the Levinson boat until the two boats were about fifty feet from one another.

16. Neither respondent reduced the speed of his boat, shut off the motor, reversed the propeller, or changed his course in time for such action to be of any effect in avoiding a collision, if at all. Both had been devoting attention to the riders being towed behind their respective boats.

17. The collision could not have occurred if either respondent had been operating his boat in a proper manner.

18. Respondent Hall, in neglecting to keep the Levinson boat under observation, failed to keep a proper lookout and failed to see the Levinson boat in time to avoid a collision.

19. Respondent Levinson failed to maintain an alert and proper lookout.

20. Both respondents failed to change course to avoid collision.

21. Each respondent, although aware of the presence of the other in the area, ignored such presence and the circumstances of danger and took no effective steps to avoid a collision.

22. There was no compliance by either respondent with the requirements of the Pilot Rules with respect to passing, passing signals, danger signals, stopping and backing.

23. Both respondents failed to comply with the statutory requirements with respect to passing, speed, stopping, reversing and right of way.

24. Decedent was a high school graduate and a very talented dancer, earning from fifty-five to seventy dollars per week during the weeks she worked. She had not reached

### *Conclusions of Law*

her full maturity as a dancer and had the prospect of a good many gainful years before her.

25. The sum of thirty thousand dollars is fair and reasonable compensation to decedent's estate for her wrongful death.

### CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties and the subject matter of the action.

2. There was no fault or negligence on the part of libelant's decedent.

3. There was negligence on the part of both respondents which proximately caused the death of libelant's decedent and for which respondents are liable as joint tort feorsors.

4. There are no mitigating circumstances to be taken into account in assessing damages.

5. Libelant is entitled to recover from respondents the sum of thirty thousand dollars.

### DECREE

It is, therefore, ordered, adjudged, and decreed that libelant recover from both respondents, jointly and severally, the sum of \$30,000.00 and his costs herein.

This decree is made and entered in lieu of the decree previously entered herein on January 16, 1952, which is hereby vacated.

MAC SWINFORD, *Judge*.

### NOTICE OF APPEAL

(Filed 2/29/52)

Notice is hereby given that respondents, Louis Levinson and Mitchell A. Hall and each of them appeal to the United States Court of Appeals for the Sixth Circuit from the

### *Assignment of Errors*

findings of fact, conclusions of law and judgment (final decree) entered herein on February 1, 1952 which gave libelant judgment against respondents, jointly and severally in the sum of \$30,000.00 and costs; and that respondents, and each of them, similarly appeal from the order of this Court entered herein on May 15, 1951 overruling respondents demurrers to the libel as amended and the order of this Court entered herein on July 18, 1951 striking paragraph (5) from each of the answers of respondents to the libel as amended which paragraph (5) each pleaded the Statute of Limitations in bar of libelants' right to recover.

LESTER AND RIEDINGER,  
By CHAS. E. LESTER, JR.  
Proctors for Respondent,  
Louis Levinson

BLAKELY, MOORE & BLAKELY  
By MARION W. MOORE  
Proctors for Respondent,  
Mitchell A. Hall

Receipt of a copy of the foregoing Notice of Appeal is acknowledged this 29th day of February, 1952.

DEUPREE & DEUPREE  
NICHOLS, WOOD, MARX & GINTER  
Proctors for Libelant.

### **ASSIGNMENT OF ERRORS**

(Filed 2/29/52)

Now come Louis Levinson and Mitchell Hall, respondents, and each of them and say that in the record and proceedings in this cause and in the judgment (final de-

*Assignment of Errors*

cree) entered herein there is manifest error in the following particulars:

(1) The Court erred in entering an order on May 15, 1951 overruling respondents' demurrers to the libel as amended.

(2) The Court erred in striking paragraph five (5) from each of the answers of respondents to the libel as amended, which paragraph five (5) each pleaded the Statute of Limitations in bar of libelants' right to recover.

(3) The Court erred in finding that on or about December 7, 1948 libelant William Deupree, Jr. qualified as Ancillary Administrator of the estate of the decedent, Katherine Wing, in the County Court of Kenton County, Kentucky.

(4) The Court erred in decreeing that the libelant recover from both respondents, jointly and severally, the sum of \$30,000.00, and his costs.

WHEREFORE respondents, and each of them, pray that said judgment (final decree) be reversed and a decree entered sustaining respondents' demurrers to the libel as amended and overruling libelant's motion to strike paragraph five (5) from each of the answers of respondents and for such other and further relief as may be proper in the premises.

LESTER & RIEDINGER

By CHAS. E. LESTER, JR.

Proctors for Respondent,

Louis Levinson.

BLAKELY, MOORE & BLAKELY

By MARION W. MOORE

Proctors for Respondent,

Mitchell A. Hall.

*Order*

Receipt of a copy of the foregoing Assignment of Errors is acknowledged this 29th day of February, 1952.

DEUPREE & DEUPREE

NICHOLS, WOOD, MARX & GINTER

Proctors for Libelant.

**ORDER**

(Entered: 3/4/1952)

This February 29, 1952 came the Respondents, by counsel, Blakely, Moore and Blakely and Lester & Riedinger<sup>2</sup> and offers for filing notice of Appeal and Assignment of Errors, which are orders filed and noted of record.

MAC SWINFORD, *Judge.*

**STIPULATION**

(Filed: 3/24/1952)

It is hereby stipulated by and between the proctors for the respective parties hereto that the following shall be included in the Transcript of Record on appeal:

1. Libel—in admiralty.
2. Answer—respondent Levinson.
3. Answer—respondent Hall.
4. Affidavit of libelant to sue in forma pauperis.
5. Special demurrer of respondent Levinson.
6. Special demurrer of respondent Hall.
7. Motion for leave to amend libel.
8. Amended libel.

*Stipulation*

9. Order filing motion and amended libel.
10. Order—pre-trial conference.
11. Order on pre-trial conference.
12. General demurrer—Levinson.
13. General demurrer—Hall.
14. Order sustaining general demurrers.
15. Memorandum of Court.
16. Motion for judgment on pleadings.
17. Judgment.
18. Mandate of United States Court of Appeals for Sixth Circuit.
19. Opinion of United States Court of Appeals for Sixth Circuit.
20. Order of May 15, 1951, setting aside judgment and overruling demurrers.
21. Answer respondent Levinson to libel as amended.
22. Answer respondent Hall to libel as amended.
23. Motion to strike from answers to amended libel.
24. Order of July 18, 1951.
25. Demurrer of libelant to Paragraph (7) of answer of respondent Levinson to amended libel.
26. Order of September 26, 1951.
27. Reply to answers.
28. Order of November 29, 1951.
29. Order of November 30, 1951.
30. Transcript of Court's opinion filed January 15, 1952.
31. Findings of fact, conclusions of law and decree filed February 1, 1952.
32. Notice of appeal filed February 29, 1952.
33. Assignment of errors filed February 29, 1952.

*Stipulation as to Record*

34. Order of March 4, 1952, filing notice of appeal and assignment of errors.
35. Stipulation for record on appeal.

CHARLES E. LESTER,

Proctor for Respondent-Appellant,  
Louis Levinson.

MARION W. MOORE

FOR BLAKELY, MOORE & BLAKELY  
Proctors for Respondent-Appellant,  
Mitchell A. Hall.

NICHOLS, WOOD, MARX & GINTER  
Proctors for Libellant-Appellee,

William Deupree, Jr., Ancillary  
Administrator of the Estate of  
Katherine Wing, Deceased.

**STIPULATION AS TO RECORD**

*To the Clerk of the U. S. District Court  
Covington, Ky.*

"The foregoing transcript of record for use in the United States Court of Appeals for the Sixth Circuit, upon the appeal in this action wherein William Deupree Jr., Ancillary Administrator of the Estate of Katherine Wing, deceased, is the Libellant and Louis Levinson and Mitchell A. Hall are the Respondents in Admiralty Action No. 364 Covington Division, has been jointly prepared by counsel for the parties to the appeal, as called for by the Stipulation as to Record, and this is your authority for treating

*Clerk's Certificate*

the foregoing . . . pages as such transcript of Record upon  
the appeal and for certifying it accordingly.

NICHOLS, WOOD, MARX & GINTER,

By

*Attorneys for the Libellant,*

~~LESTER AND RIEDINGER,~~

By

*Attorneys for Respondent,*

*Louis Levinson,*

BLAKELY, MOORE AND BLAKELY,

By

*Attorney for Respondent,*

*Mitchell A. Hall.*

**CLERK'S CERTIFICATE**

I, A. B. Rouse, Clerk of the United States District Court  
for the Eastern District of Kentucky, do hereby certify  
that foregoing . . . pages constitute a true, Transcript  
of Record as called for by the Stipulation of Counsel, in  
the action of William Deupree Jr., etc., Libellant v. Louis  
Levinson, et al., Respondents, as the same is of record and  
on file in my said office.

Witness my hand and the official seal of said Court this  
the . . . day of May, 1952.

A. B. ROUSE, *Clerk.*

By

GEORGE W. REGAN, *Deputy Clerk.*

PROCEEDINGS IN THE  
**UNITED STATES COURT OF APPEALS**  
FOR THE SIXTH CIRCUIT

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**CAUSE ARGUED AND SUBMITTED**

(October 17, 1952—Before: HICKS, ALLEN and  
McALLISTER, JJ.)

This cause is argued by Charles E. Lester for appellants and by Robert S. Marx for appellee and is submitted to the Court.

**JUDGMENT**

(Filed October 20, 1952)

This cause was heard upon the transcript of record, brief of appellants and motion of appellee for a summary affirmance of the judgment appealed from and arguments of counsel.

Upon consideration of all of which the Court is of the opinion that there is no reversible error upon the record.

It is therefore, ordered and adjudged that the judgment of the District Court entered February 17, 1952, and herein appealed from, be and is in all things affirmed upon the grounds and for the reasons set forth in the opinion of the District Judge filed January 15, 1952, and the findings of fact and conclusions of law filed February 1, 1952, and upon the authority of *Deupree vs. Levinson, et al*, 186 Fed. 2nd, 297 CCA 6.

**CLERK'S CERTIFICATE**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE SIXTH CIRCUIT**

I, CARL W. REUSS, Clerk of the United States Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of *Louis Levinson and Mitchell A. Hall v. William Deupree, Jr., Ancillary Admr.*, No. 11,600, as the same remains upon the files and records of said United States Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 28th day of October, A.D. 1952.

CARL W. REUSS,

*Clerk of the United States Court of Appeals for the Sixth Circuit.*

(SEAL)

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 439

LOUIS LEVINSON and MITCHELL A. HALL, Petitioners,

vs.

WILLIAM DEUPREE, JR., Ancillary Administrator of the  
 Estate of Katherine Wing, Deceased

ORDER ALLOWING CERTIORARI—Filed December 15, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.